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Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11390 of 2017

(Arising out of OIO-SIL-EXCUS-000-COM-089-090-16-17 dated 09/03/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VAPI)

C.C.E & S.T.-Silvasa ....**Appellant**
Commissioner Central Excise, Customs & Service Tax, Silvassa, 4th Floor, Adarsh Dham Building, Vapi Daman Road Vapi, Opp. Old Town Police Station
VAPI, Gujarat

VERSUS

Aalidhra Textool Engineers Pvt Ltd ....**Respondent**
Survey No. 122-5, Vaghdhara Road,Dadra
SILVASSA, DADRA NAGAR & HAVELI

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APPEARANCE:
Shri Kalpesh Shah, Superintendent (AR) for the Appellant
Shri Amal Dave, Advocate for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11744-11745 /2022

DATE OF HEARING: 14.11.2022
DATE OF DECISION: 28.11.2022

RAMESH NAIR

The brief facts of the case are that the respondents are engaged in the manufacturing of textile machineries. As per the contract with the buyer, on an agreed sales price, the respondent is under obligation to manufacture, pack, transport, deliver and erect and install the machinery at the buyer's site. The respondent have discharged excise duty on their total sale value

including the erection, installation and commissioning of such machinery for the period July-2003 to March-2008. The adjudicating authority while adjudicating the show cause notices dropped the same vide adjudication order. The revenue being aggrieved by the Order-In-Original to the extent demand pertains to the period 01.06.2007 onwards, filed the present appeals on the ground that post 01.06.2007, since the respondent have supplied the goods and carried out erection, installation and commissioning, the service should have been classified under Works Contract Service and respondent was liable to pay service tax.

02. Shri Tara Prakash, learned Assistant Commissioner (AR) appearing on behalf of the revenue appellant submits that there is no dispute that from 01.06.2007 onwards the supply of goods along with erection, installation and commissioning falls under the Works Contract Service and that composite activity is liable to service tax therefore, the adjudicating authority has erred in dropping the demand. He reiterates the grounds of appeal. He placed reliance upon following judgments:-

- STATE OF KARNATAKA V/s. PRO LAB- 2015 (321) ELT 366 (SC)
- KONE ELEVATOR INDIA P LTD.- 2014 (304) ELT 161 (SC)

03. On the other hand Shri Amal Dave, learned counsel appearing on behalf of the respondent submits that the demand in the show cause notice was raised under erection, installation and commissioning service whereas, the department in the present appeals seeking the confirmation of demand on the same service under Works Contract Service. He submits that the classification of service proposed in the show cause notices cannot be altered or changed at the appellate stage therefore, the demand under works contract service as against the proposal of the same under Erection, Installation and Commissioning Service in the show cause notice cannot be confirmed. In this regard, he placed reliance on the following judgments:-

- PRECISION RUBBER INDUSTRIES (P) LTD.- 2016 (334) ELT 577 (S.C.)
- WARNER HINDUSTAN LTD.- 1999 (113) ELT 24 (S.C.)
- BRITISH ELECTRICALS- 2017 (345) ELT 535 (Tri.-Mumbai)

3.1 He further submits that there is no divisible portion of service in the entire supply of machinery. The respondent has manufactured and sold the machines to the buyer at his place including the activity of erection, installation and commissioning which has a composite part of sale of goods only hence service is not involved. He submits that as per the contract there

is no bifurcation of value towards sale and services therefore, the entire activity, being sale of goods on which duty was paid cannot be bifurcated into sale and service. He placed reliance on the following judgments:-

- M/S. BALLARPUR INDUSTRIES LTD.- 2007 (215) ELT 489 (S.C.)
- M/S. TOYO ENGINEERING INDIA LTD.- 2006 (201) ELT 513 (S.C.)
- M/S. ALIDHARA TEXSPIN ENGINEERS- 2010 (20) STR 315 (Tri.-Ahmd.)
- M/S. ALLENGERS MEDICAL SYSTEMS LTD.- 2012 (277) ELT 184 (Tri.-Del.)

3.2 He further submits that in the case of STATE OF KARNATAKA V/s. PRO LAB- 2015 (321) ELT 366 (SC) and KONE ELEVATOR INDIA P LTD.- 2014 (304) ELT 161 (SC), these judgements involving different facts then the facts of the present case are not applicable.

04. We have carefully considered the submissions made by both the sides and perused the records. We find that there is no dispute that the respondent is a manufacturer of textile machinery and as per the contract they have supplied the goods along with Erection, Commissioning and Installation at the buyer's site. On the entire activity, right from the manufacturing upto the commissioning of machinery at buyer's site, the total value is towards the sale of goods. There is no bifurcation of the value in sale of goods and service of Erection, Installation and Commissioning. In such position the entire value of the goods has to be taken as sale value, consequently, no service value is involved separately. In the identical set of transaction, this tribunal has consistently taken a view that when there is a manufacturing and sale of the goods on a particular sale price which involves incidental service such as in the present case, no service tax can be demanded once the entire value is towards sale and has suffered the central excise duty. This issue in the appellant's own case has been decided by this tribunal as under:-

- M/s. Alidhara Texspin Engineers- 2010 (20) STR 315 (Tri.-Ahmd.)

> ***8.*** *We have considered the submissions made by both the sides and have gone through the impugned order. Some of the undisputed facts in the present case are that, appellants are primarily and mainly engaged in the manufacture of textile machinery. A contract entered into by them with their buyers for a lump sum amount and the sale price is inclusive of installation and commissioning charges. It is also not disputed that appellants have paid the Central Excise duty on the complete value and have not claimed any deduction on account of installation and commissioning charges. In fact, no*

segregated amount stands arrived at in the contract towards the installation or commissioning charges. This is also undisputed that the appellants have availed the services of sub-contractors in respect of erection, installation and commissioning and such sub-contractors have paid service tax on the same which subsequently stands reimbursed by the appellant.

9. *In view of the factual back drop, we may now refer to the definition of erection, commissioning and installation, as available in Section 65 (39a) of the Finance Act, 1994 :-*

(I) From 10-9-2004 to 15-6-2005

"erection, commissioning or installation" means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment;'

(II) From 16-6-2005

"erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to, -

(i) erection, Commissioning or installation of plant, machinery or equipment; or

(ii) installation of -

(a) electrical and electronic devises, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services;

(III) From 1-5-2006

"erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to' -

(i) erection, commissioning or installation of plant, machinery, equipment or structures whether pre-fabricated or otherwise; or

(ii) Installation of -

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, or

(d) thermal insulation sound insulation fire proofing or water proofing

(e) lift and escalator fire escape staircases or traveators; or

(f) such other similar services.

As is seen from the above, the one of the ingredients of the definition is that services must be provided by commissioning and installation agency. Admittedly, the appellant is not an agency engaged in providing services of Installation, erection and commissioning etc. They are essentially a manufacturing unit engaged in the manufacture of textile machinery, which is undertaken to be supplied to their customer in a fully commissioned state.

10. *Tribunal in the case of Allengers Medical Systems Limited v. Commissioner of Central Excise, Chandigarh - 2009 (14) S.T.R. 235 (Tri.-Del.) in an identical set of facts and circumstances has observed that where the assessee is paying Central Excise duty on the manufacture and sale of medical equipments on the total value recovered by them from their customers and where the activities of erection, commissioning and installation of equipments is a part of sale of excisable goods and where there is no separate charging for erection and commissioning of equipments, levy of service tax on such activities cannot be held to be proper and legal. The Tribunal held that activity of installation, erection and commissioning was incidental to the deliver of goods to the customers and as such, no service tax can be confirmed against the appellants.*

11. *Learned advocate has also drawn our attention to the decision of the Hon'ble High Court of Madhya Pradesh in the case of Maa Sharda Wine Traders v. UOI - 2009 (15) S.T.R. 3 (M.P.), the question placed before the Hon'ble High Court was as to whether bottling of liquor amounts to manufacture of liquor or only packaging so as to attract service tax. The Hon'ble High Court observed that whether activity amount to manufacture or not it is incumbant to take note of any process which is incidental or ancillary to the completion of the final product, whether the final product is excisable or not. The Court further observed that the definition of manufacture as contained in Section 2(14) of the 1915 Act, is an inclusive definition which covers every process whether incidental or artificial by which the intoxicant is produced or prepared. By taking note of the precedent decisions, it was observed that the manufacture process dose not necessarily mean that it has to be excisable goods but would include any process which is incidental or ancillary to the completion of manufactured product. As such, the Hon'ble High Court observed that the process of manufacture as defined under Section 2(14) of the 1915 Act falls within the ambit and sweep of the Section 2(f) (1) of Central Excise Act, 1944 and therefore, there can be no levy of service tax on the manufacturer in view of the clear postulate under Section 65(76b) of the Finance Act, 2005. Though the above judgment was given in the different facts and circumstances but we find that observations made by the Hon'ble High Court fully covers the legal issue in the present case.*

12. *Similarly in the case of CCE, Vapi v. Alidhara Textool Engineers Pvt. Limited - 2009 (14) S.T.R. 305 (T) = 2009 (239) E.L.T. 334 (Tri. - Ahmd.) it was observed as under :-*

"4.1 In this case erection and commissioning charges have been included in the cost of the machines sold. The appellants have selected the agency to do this work and once the purchaser enters into an agreement for supply of the machine including the erection and commissioning charges, the responsibility for erection and commissioning is of the manufacturer. Therefore what is happening in this case is that the supplier of the machine is not only selling the machine but is also providing the service of erection and commissioning. Once erection and commissioning cost is included, in the transaction value the natural conclusion that would emerge is that the processes undertaken in the buyer's premises are actually incidental to manufacturing activity undertaken in the manufacturer's premises. What has been sold in this case is the complete machine duly erected and commissioned' and operational. The incidental process of erection and commissioning being incidental to manufacture, has to be treated as continuation of the earlier process which started in the manufacturer's premises. In this case even though the position of the machine in CKD condition gets transferred to the buyer when it is removed from the factory as per the contract, the question to be examined is whether such a service is related directly or indirectly to the manufacture of their goods in question. As already mentioned by me earlier, the process of erection and commissioning at the buyer's premises is incidental to the manufacture of the machine and therefore the erection and commissioning services provided also can be said to be in relation to the manufacture, since the process in this case is complete only after the erection and commissioning takes place."

The above observation made by the Tribunal, even though the issue involved was availment of Cenvat credit of service tax paid by them on erection and commissioning services, supports the appellant's case.

13. *The Tribunal judgment in the case of Neo Structo Construction Limited - Order No. A/338-339/WZB/AHD/2010 dated 18-3-2010 [2010 (19) S.T.R. 361 (T)] was also produced before us in support of the contention that where the activities amounts to manufacture and excise duty is being paid on the entire contract value, no liability to pay service tax arises. Operative part of the said order is reproduced below :-*

"27. From the above discussion, it is clear that the activity undertaken by the appellant is covered under Section 2(f) of Central Excise Act as manufacturing activity. Hence the appellants are not liable to pay the service tax on the activities undertaken by them. Hence the impugned order does not hold any merit on this issue. The same is set-aside and the appeal filed by M/s. Neo Structo Construction Limited is allowed."

14. *Ratio of all the above decisions is to the effect that where an activity so Integrarely related and connected with the manufacturing activity and the purchase orders are for the complete plant ind machineries, duty commissioned, without showing any segregated amount recovered for erection and commissioning and where the entire contract value is taken as an assessable value for the purpose of payment of excise duty, no service tax is liable to be paid by the assessee. The decision of the Tribunal in the case of Lincoln Helios (India) Limited relied upon by the Commissioner in his impugned order laying to the contrary, cannot be followed inasmuch as the same stands rendered by a Single Member Bench in contradiction to the Divisional Bench judgment available in the case of Allengers Medical Systems Limited (referred supra). Further the said judgment in the case of Lincoln*

Helios (India) Limited was rendered in the year 2006 whereas the Allengers Medical Systems judgment stands passed in the year 2009, which stands passed after considering the Hon'ble Supreme Court judgment in the case of State of Andhra Pradesh v. Kone Elevators (India) Limited - 2005 (181) E.L.T. 156 (S.C.), as also Tribunal decision in the case of Idea Mobile Communications Limited v. Commissioner - 2006 (4) S.T.R. 132 (Tribunal).

***15.** In view of our above discussions, we hold that appellants were not liable to pay any service tax. Accordingly, the impugned order confirming the demand and imposing penalties upon them is set-aside and appeal is allowed with consequential relief. Inasmuch as we have allowed the appeal on mere, the issue of demand being barred by limitation is only of academic interest and its not being gone into.*

- M/s. Allengers Medical Systems Ltd.- 2012 (277) ELT 184 (Tri.-Del.)

***4.**After hearing both the sides and on perusal of the record, it is seen that the representative of the appellants in his statement dated 13th October, 2005 stated that OBDI contained the total cost of equipment including the cost of machine and value of optional services such as erection and commissioning of machines and equipment sold by them. In reply to show cause notice, the appellants contended that they had been paying duty on the total invoice value of medical equipment charged from the customers, which establishes the activity of installation, commissioning or erection had been considered as part of sale. On perusal of the copy of the Central Excise invoice and the Annexure VI to the show cause notice, we find that the demand of tax was determined on the basis of Central Excise invoice value, as taxable value. It is also noticed that for some periods, taxable value has been taken as 33% of invoice value in terms of the Notification No. 19/2003-S.T. dated 21-8-2003 as amended. In some cases, total invoice value has been taken as taxable value since the appellant was availing Cenvat credit of invoice and benefit under Notification No. 19/03-S.T. dated 21st August, 2003 cannot be availed. The learned Advocate submits that in only one case, they charged commissioning and installation charges separately in the purchase order wherein they paid service tax. The main contention of the learned Advocate is that they have paid the Central Excise duty on the invoice value and the demand of tax on the said value is not sustainable.*

***5.**We find force in the submission of the learned Advocate. It is seen that the appellants paid the Central Excise duty on the manufacture and sale of medical equipments as is evident from the invoice. The appellant is not contesting the levy of Central Excise duty. It appears that the activity of erection, commissioning and installation of equipments are part of sale of excisable goods and Central Excise duty was paid thereon. There is no material placed by the Revenue that the appellants charged separately for erection and commissioning of equipments. In this context, the levy of service tax on such activity like erection, commissioning and installation is not proper and legal. The learned DR contended that the OBDI indicates contract for erection and installation of the medical equipments at the customer premises. We are unable to accept the contention of the learned DR. We are of the view that whether the activity is service or sale would be determined on the basis of examination of the contract between the parties and evidences.*

6.*The Hon'ble Supreme Court in the case of Kone Elevators (I) Pvt. Ltd. (supra) held that the substance and terms of contract, customs or trade and circumstances/facts of each case are to be looked into in this aspect. In the said case, the Hon'ble Supreme court held that if the main object of contract is transfer of finished goods, it is contract of sale. If the main object is work and labour and property passing by accessories during the process of work to the movable property of customer, it is works-contract. The relevant portion of the decision of the Hon'ble Supreme court in the case of Kone Elevators (I) Ltd. supra is reproduced below :*

"It can be treated as well settled that there is no standard formula by which one can distinguish a 'contract for sale' from a 'works contract'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged there under and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous properly, then the contract is a contact for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a 'contract of sale', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a 'contract for work' is not the transfer of the property but is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to be customer is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a sale if it the latter, it is a 'works contract'. Therefore, in judging whether the contract is for a sale or for work and labour, the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The pre-dominant object of the contract the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a sale or a works contract. Essentially, the question is of interpretation of the contract. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a sale or a works contract. Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

7.*In the present case, the appellants manufactured and hold the medical equipment. It is revealed from the record that the activity of installation, erection and commissioning are incidental to delivery of goods to the customers. Therefore, there is no reason for levy of service tax on the installation and commissioning of medical equipment.*

8.*The learned DR relied upon the decisions of the Hon'ble Supreme Court which are not applicable in the present case.*

(a) In the case of Moriroku UT India (P) Ltd. (supra), it has been held that liability under excise law is event based irrespective of whether the goods are sold or captively consumed.

(b) In the case of N.M. Goel & Co. (supra), it has been held that in order to be sale and levy of duty, not only the property in the goods should pass from the contractor to the Government, but they should be independent contract, separate and distinct, apart from mere passing of the property.

(c) In the case of Imagic Creative Pvt. Ltd. (supra), the issue is whether the service provider paying service tax is liable to Sales Tax/VAT which are mutually exclusive. It has been held that having regard to the respective parameters on service tax and the sales tax as envisaged in a composite contract, from an indivisible contract levy would be determined.

9.*We find that in the instant case, the appellant engaged on business of manufacturer and sale of medical equipment and no separate contract for erection and installation of the medical equipments. The erection and installation charges are covered in the value of the medical equipments and the central excise duty was discharged thereon. So, the case laws relied upon by the learned DR are not applicable herein.*

10.*In view of the above discussion, we find that the demand of tax and penalties are not sustainable. Accordingly the impugned order is set aside. The appeal is allowed with consequential relief.*

- M/s. Rahil Air Bubbles Pvt. Ltd.- Final Order No. A/11894/2019 dated 17.09.2019.

4. We have carefully considered the submission made by both sides and perused the records. We find that the entire transaction is of purchase of imported bubble wrap machines. The appellants have discharged custom duty considering the total value of machine shown in the invoice. There is no separate charge for service such are erection and installation of such machinery. On the total value of the invoice, Custom duty was paid. The erection and installation is incidental to the sale/supply of the machine. Therefore, the entire transaction is of sale and purchase of the machine and, hence, no service is involved. Therefore, no Service Tax can be demanded. This issue is squarely covered by the Tribunal judgment in the case of Bhavik Terryab (supra) wherein the Tribunal has passed the following order.

> *"5. We have heard both sides and perused the appeal records. We note that there is a certificate issued by the jurisdictional Superintendent of Central Excise on 07.07.2006 in connection with the appellant"s obligation under the ECCG Scheme indicating the installation of 2 of the machines prior to 18.04.2006. Similarly, there are certain indications, based on the correspondence entered into by the appellant with the supplier of machines, that the supplier appears to have had an establishment in India during the material time. Further, the contract for importation of this machinery is, admittedly, a composite one for lump-sum payment which included installation and erection of the machine at the appellant"s premises. The customs duty on the whole value is claimed to have been discharged by the appellant. In such situation we ST/186/2012-ST [DB] find that the question of subjecting a portion of the invoice value for service tax purpose is not sustainable. In this connection, we refer to the decision of the Tribunal in Allengers Medical Systems Ltd. vs. C.C.E., Chandigarh –2009 (14) STR 235 (Tri.-Del.) and*

Alidhara Texspin Engineers vs. Commissioner of Central Excise & Customs, Vapi - 2010 (20) STR 315 (Tri.-Ahmd.)

6. The Tribunal, though dealing with manufactured item held that if the contract is all inclusive lump-sum without any separate split up for erection and commissioning and excise duty was discharged on the whole value, there is no liability to service tax on the part of the value.

7. We find, prima-facie, the split up of value for service tax purpose, when the whole value has been subjected to customs duty towards import of goods, is not sustainable. However, the basic facts like contract and the invoices alongwith the other issues raised by the appellant is to be examined afresh by the original authority. We also note that composite non-vivisectable contracts are not liable to service tax under the category of „works contract service" prior to 01.06.2007 as held by the Hon"ble Supreme Court in Larsen & Tubro Ltd. 2015 (39) STR 913 (SC).

8. Considering the need for verifying all the factual details and non-consideration of facts placed by the appellant at the 5 ST/186/2012-ST [DB] time of original decision, we find it fit and proper to remand the case to the original authority for a fresh decision. Since the matter is remanded, all other issues are kept open including the question of time bar raised by the appellant. Accordingly, the appeal is allowed by way of remand."

From the above judgment, which is relied upon various decisions of this Tribunal where it was held that in case of import of machine including the erection and installation, it is not permissible to artificially bifurcate the service value from the total value. Accordingly, no Service Tax can be demanded for such import. Being an identical issue and the facts involving in the present case, it is squarely covered by the judgment of Bhavik Terryab (supra). Following the ratio of the said decision, we set aside the impugned order and allow the appeal.

From the above judgments, it is settled that where the entire value of the goods is towards sale of the goods and subjected to excise duty/customs duty no part of the same can be said to have been collected towards any service. Therefore, involving the same set of facts, in the present case where the entire value has suffered excise duty and the buyer is under obligation to not only manufacture and supply the machinery but also to carry out activity of erection, commissioning and installation of the said machinery, the service tax cannot be demanded.

4.1 The revenue also made a ground that after 01.06.2007 the service in the present case is classifiable and taxable under works contract service. However, the show cause notices have proposed the demand under erection, installation and commissioning service. We have decided that the service tax

is not payable on the erection, installation and commissioning of service in the facts of the present case as the entire value has suffered excise duty and on this ground service tax is not payable. Therefore, we are not dealing with the second issue about classification of the service that whether the service tax is payable under erection, installation and commissioning service or works contract service.

05. With our above observation, we are of the view that the respondent is not liable to pay service tax in the given transaction of the present case therefore, the revenue's appeal is not sustainable accordingly, we uphold the impugned order and dismiss the appeals filed by the revenue.

(Pronounced in the open court on 28.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul